Supreme Court, U.S.
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No. 95-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

TAM S. BUI,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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June 28, 1995

86pp

QUESTION PRESENTED

Whether police officers' warrantless protective sweep of a home--without any arrest and including areas where no person could be concealed--violates the Fourth Amendment as construed in Maryland v. Buie, 494 U.S. 325 (1990), as to which the courts of appeals are in conflict.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

TAM S. BUI,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

TAM S. BUI respectfully petitions this Court for a writ of certiorari to review the order and opinion of the Massachusetts Supreme Judicial Court affirming his convictions for murder and armed robbery.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court, published as Commonwealth v. Bui, 419 Mass. 392, 645 N.E. 2d 689 (1995), is Appendix A to this petition. The order denying Mr. Bui's petition for rehearing is Appendix B. The rulings and order of the trial court denying petitioner's motion to suppress evidence are Appendix C. Petitioner's Affidavit, filed in support of his motion to suppress evidence, is Appendix D.

JURISDICTION

The opinion and order of the Massachusetts Supreme Judicial Court affirming petitioner's convictions were entered on February 1, 1995. The court's denial of petitioner's petition for rehearing was entered on February 28,

1995. By Order dated May 9, 1995, Justice Souter granted petitioner's application for an extension of time within which to file this petition for writ of certiorari, to and including June 28, 1995. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The opinions below contain all the facts and rulings relevant to the issues presented in this petition. A1-A31, A32-52. This is a brief summary.

The petition arises from a state murder prosecution. By indictment returned in September, 1990, petitioner and two others were charged with the murders of Ngoc Le and her daughter Dixie Poulin and with the armed robbery of Ngoc Le's jewelry. The trials were severed.

A principal pre-trial issue was the admissibility of a handgun seized during a protective sweep of petitioner's parents' apartment. Petitioner, 20 years old at the time of the search, asserted that he lived with his parents and urged that the warrantless seizure of the gun "violated his rights under the Fourth and

Fourteenth Amendments to the U.S. Constitution." A. 33, A52-A53.

Police had only an arrest warrant and a "no-knock" warrant to search the apartment for petitioner himself. But the courts found that police were also "seeking a gun believed to have been used in the course of the crimes," for which they had no warrant. A6, A35-37.

Police did not find petitioner during the search, nor did they arrest anyone else. While immobilizing petitioner's family--his mother, father and four siblings--police kicked up a mattress; on top of the box spring they found a gun. A7, A37-A39.

The state urged that the gun was lawfully discovered and seized during a "protective sweep" authorized by Maryland

v. Buie, 494 U.S. 325 (1990). Although the state did not challenge petitioner's standing, the lower court disposed of his motion on this basis. Commonwealth's memorandum of law in opposition to defendant's motion to suppress; A43-A51. (By contrast, the state's highest court assumed that he did have standing. A6.)

At trial, in April, 1992, the gun provided the state's sole forensic evidence connecting petitioner to these murders. Through expert testimony, the state showed how the gun, which belonged to petitioner, could have been the blunt object used on the head of one of the victims. A5.

Petitioner was convicted of both murders and the armed robbery. The court imposed two consecutive life terms and a concurrent 19-20 year sentence.

On direct appeal, petitioner urged that he was entitled to standing under the Fourth Amendment as a matter of law and that the warrantless search and seizure of the gun "exceeded the scope of any permissible 'protective sweep' of the apartment." Relying on Maryland v. Buie, 494 U.S. 325 (1990), he argued that a sweep not conducted incident to an arrest and including places where a person could not be concealed violated the Fourth Amendment. Petitioner's appellate brief.

The Massachusetts Supreme Judicial Court recognized that the gun was "important" evidence and "assumed, without deciding," that petitioner had standing to challenge its seizure. A5-A6.

The court held that, under Buie, police were entitled to conduct a warrantless protective sweep for weapons, without an arrest and including places where no person could be concealed:

> Our conclusion that the officer was entitled to protect himself and his associates from the threat of any readily accessible weapon, before the search of the premises for the defendant was completed and before the apartment's occupants were immobilized, is supported by the reasoning of Maryland v. Buie, 494 U.S. 325 (1990). In the Buie case, the protective sweep was permissible, even though conducted after the person arrested pursuant to a warrant was in custody, if it was justified by articulable facts that "would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. at 334. In our case, the concern was weapons --not the possibility that the defendant or some confederate was under the mattress. The relevant safety concerns, however, are similar. In our case, the officer acted "to take reasonable steps to ensure their safety." Id. The search was limited in scope and occurred at a time when the

> suspicion of danger had not been dispelled. The officer could not have known whether events in other parts of the apartment might distract him and his colleague, leaving the occupants of the room with access to any weapon under the mattress. A6-A10.

Because Massachusetts' highest court reached the merits of petitioner's Fourth Amendment claim, the question is properly before this court. Raley v. Ohio, 360 U.S. 423, 436 (1959).

REASONS FOR GRANTING THE WRIT

Whether A Warrantless Protective Sweep May Be Conducted Without An Arrest and May Include Places Where No Person Could Be Hiding Is An Important Question of Fourth Amendment Law Ripe For This Court's Consideration.

1. Massachusetts' Decision On The Scope of a Warrantless Protective Sweep Conflicts With This Court's Ruling in Maryland v. Buie.

In Maryland v. Buie, 494 U.S. 325 (1990), this court established a

"protective sweep" exception to the Fourth Amendment's warrant requirement.

In that case, after lawfully arresting the defendant as he emerged from the basement of his home, police entered the basement "in case there was someone else" down there; found physical evidence in plain view; and seized it. Since the plain view doctrine is well-established, the only issue was whether the Fourth Amendment permitted officers to enter the basement without a warrant. Id. at 330.

This court held that the search was a lawful "protective sweep" for other dangerous people, defined as

> a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. Id. at 327, emphasis added.

This court then set standards for the use of these limited searches:

> We. . .hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. 494 U.S. at 334, emphasis added.

The Buie opinion thus hammers home two conditions of the warrantless protective sweep: (1) it may only be conducted "incident to an arrest," and (2) its scope is limited "to a cursory inspection of those spaces where a person may be found." Id. at 327, 333, 335-336.

In both Buie and petitioner's case, police only had warrants to search for a

person. In two other key respects, the circumstances are different.

First, unlike the officers in Buie, officers here swept petitioner's home without arresting anyone. A7, A43.

Second, unlike the officers in Buie, who were seeking other dangerous people and found evidence in plain view, officers here "were seeking a gun believed to have been used in the course of the crimes"[2] and looked in a place where no person could be hidden. A6.

Massachusetts has thus extended the scope of a warrantless protective sweep in two significant ways.

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[2]Since officers conceded that, from the time they sought warrants to arrest and search for petitioner, they intended to conduct a warrantless search for guns, this was properly not treated as a case involving exigent circumstances. Trupiano v. United States, 334 U.S. 699, 709 (1948).

2. As To Whether A Warrantless Protective Sweep May Proceed Without An Arrest, Massachusetts' Decision Conflicts With A Decision of the Fifth Circuit and the Illinois Court of Appeals; And These Latter Decisions Conflict With a Decision of the Ninth Circuit.

Massachusetts' decision--insofar as it permits a protective sweep without any arrest--is in direct conflict with a decision of the Fifth Circuit.

In United States v. Wilson, 36 F.3d 1298 (5th Cir. 1994), the court found a protective sweep illegal since it was "not made as an incident to an arrest." Id. at 1305, citing Maryland v. Buie, 494 U.S. 325, 327 (1990); accord, Illinois v. Rushing, No. 1-92-0877, 1995 Ill. App. LEXIS 288, at *8-9 (Ill. App. Ct. Apr. 26, 1995).

By contrast, in United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993), the Ninth Circuit found that evidence found in plain view during a pre-arrest warrantless "protective sweep" of the defendant's apartment was properly used to establish probable cause to arrest him. Id. at 1282.

3. As to Whether A Warrantless Protective Sweep May Include Places Where a Person Cannot Be Concealed, Massachusetts' Decision Conflicts With Decisions From the Courts of Appeals for the District of Columbia, Fifth, Tenth and Eleventh Circuits; And These Latter Decisions Conflict With Decisions of the Second and Eighth Circuits.

Notwithstanding this court's holding that protective sweeps are limited to searches for people in "those spaces where a person may be found," Buie,

supra, 494 U.S. at 334, Massachusetts here approved officers' search for a gun in an area between a mattress and a box spring. A6-A7, A39.

Four circuit courts of appeals have issued decisions in direct conflict with that of Massachusetts' highest court.

The D.C. Circuit just reversed a conviction because grounded in part on evidence found both under a mattress and behind window shades during a protective sweep incident to an arrest. United States v. Ford, No. 94-3057, 1995 U.S. App. LEXIS 14326, at *15-19 (D.C. Cir. June 9, 1995).

There, as here, officers searched the defendant's parents' apartment pursuant to an arrest warrant; conceded they were looking for a gun, not a

person; and looked in places where no person could be concealed. Under these circumstances, the court held that the officer's "search under the mattress and behind the window shades went beyond the narrowly confined protective sweep articulated in Buie." Id. at *25.

The Fifth Circuit has taken the same position, reversing a conviction founded in part on evidence found in a wastebasket, since no person could have been concealed there. United States v. Wilson, 36 F.3d 1298, 1306 (5th Cir. 1994), citing Maryland v. Buie, 494 U.S. 325, 327 (1990).

Similarly, the Tenth Circuit has held that the warrantless search under two pillows following the arrest of several defendants "went beyond the scope of a proper protective sweep," since the

"government cannot plausibly argue that the detectives believed that dangerous accomplices might have been hiding under the bed pillows. . . ." United States v. Parra, 2 F.3d 1058, 1063, 1065-1066 and n.4 (10th Cir. 1993), cert. den., 510 U.S. ___, 126 L.Ed.2d 597, 114 S.Ct. 639.

Finally, in two cases the Eleventh Circuit affirmed lower court rulings suppressing evidence found during protective sweeps in places where a reasonable officer would not conclude a person could be hiding. United States v. Hromada, 49 F.3d 685, 688 n.6, 690 and n.10 (11th Cir. 1995) (evidence found in padlocked greenhouse properly suppressed; rest of sweep lawful since officers "opened doors only to areas large enough to harbor a person" and "no evidence that officers opened drawers," etc.); United

States v. Tobin, 923 F.2d 1506, 1513 and n.7 (11th Cir. 1991), cert. den., 116 L.Ed. 2d 243, 112 S.Ct. 299 (evidence found in drawers and cabinets properly suppressed; evidence found in plain view in shower stall lawful).

By contrast, the Second and Eighth circuits have issued decisions in accord with Massachusetts' decision and in conflict with the above circuits.

Like the present case, United States v. Hernandez, 941 F.2d 133 (2nd Cir. 1991) concerned a warrantless search for weapons between a mattress and box spring near a woman police had placed on the floor during a protective sweep. Holding the search justified, the Second Circuit stated that Buie sweeps are not limited to "a search for people in places where they may be hiding" but may also include

a search "for weapons within the grab area of an individual whom the government agents have reasonably concluded is dangerous." Id. at 135-137.

On similar grounds, the Eighth Circuit held constitutional a protective sweep which included a search under couch and chair cushions. United States v. Horne, 4 F.3d 579, 586-587 (8th Cir. 1993).[3]

We also draw this court's attention to opinions of the First and Sixth Circuits touching on but not deciding the question here. See, Crooker v. Metallo,

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[3]Given the disagreement among the circuits, the Eighth Circuit may now be more reticent to extend Buie as it did in Horne, supra. It recently declined to address a well-preserved Buie issue--whether the search of a closed suitcase exceeded the scope of a protective sweep --and decided the case on a ground not relied upon below. United States v. Vance, No. 94-3285, 1995 U.S. App. LEXIS 10068, at *2-3 (8th Cir., May 5, 1995).

5 F.3d 583, 584-585 (1st Cir. 1993) (since "uncertainty . . .shrouds" the scope of a Buie search even today, officers who made a "limited search for accessible weapons" between a mattress and box spring incident to a 1989 in-home arrest are entitled to qualified immunity in civil rights suit); relying in part on United States v. Elkins, 732 F.2d 1280, 1283-1284 (6th Cir. 1984) (approving warrantless "protective sweep for other persons and weapons"), cited with approval in Bills v. Aseltine, 958 F.2d 697, 704 (6th Cir. 1992).[4]

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[4]In Bills, the Sixth Circuit asserted that Elkins concerned only items found in plain view during the sweep. 958 F.2d at 704. But Elkins was not so clear; while drugs were found in plain view, the opinion did not state where the "fifteen to twenty firearms" also seized were discovered. 732 F.2d at 1283-1285. It seems unlikely that this entire arsenal was out in the open.

4. Massachusetts' Decision on the Scope of a Buie Sweep Conflicts With Appellate Decisions in Illinois, Kansas and Louisiana and Is In Accord With A California Decision.

Unlike Massachusetts, other states have held that the Fourth Amendment prohibits protective sweeps into areas where a person could not be hidden.

Where officers looked in a washing machine during a protective sweep, the Kansas Supreme Court held that the scope of the sweep "exceeded the limitations established in Buie," violating the defendant's Fourth Amendment rights. Kansas v. Johnson, 253 Kan. 356, 370, 856 P.2d 134, 143 (1993).

Similarly, the Illinois Appellate Court recently held that the protective sweep exception to the Fourth Amendment warrant requirement did not permit a search of a tool box found under a bed.

Illinois v. Rushing, No. 1-92-0877, 1995 Ill. App. LEXIS 288, at *8-11 (Ill. App. Ct. Apr. 26, 1995).

And in Louisiana v. Jynes, 626 So.2d 459 (La. App. 1993), where officers found a gun behind objects on a closet shelf, the court held that this "constituted more than the limited search authorized in a protective sweep." Id. at 458. See also, United States v. Harris, 629 A.2d 481, 495 (D.C. 1993) (lawfulness of protective Buie sweep yielding gun turned on whether gun was in plain view or in a concealed location).

By contrast, a California appellate court has ruled that, during a warrantless Buie sweep incident to an in-home arrest, officers were entitled to open a bag--discovered in a pile of laundry where a person could have been

concealed--and to seize a gun found inside the bag. California v. Maier, 277 Cal. Rptr. 667, 668-670, 226 Cal. App. 3d 1670, 1673-1677 (Cal. Ct. App. 1991).

Not explaining why Buie entitled officers to seize evidence not found in plain view, the court summarily held that the seizure was "lawful as part of a search for others ('protective sweep') under a controlling interpretation of the Fourth Amendment by the United States Supreme Court in Maryland v. Buie, 494 U.S. 325, 327 (1990)." Id. at 669.

5. The Question Presented Is Important.

In Buie, this court sought to resolve the tension between vital competing interests: officer safety and citizen privacy. 494 U.S. at 334. Since a warrantless protective sweep of a

private home is particularly "susceptible to exploitation," this court narrowly tailored its scope to "strike the proper balance" between these interests. Id.

As the litigation already engendered by Buie shows, any new exception to the Fourth Amendment's warrant requirement quickly resonates in the law enforcement community. Searches--particularly warrantless searches--are powerful and effective law enforcement tools.

But if the protective sweep exception is to be broadened to non-arrest situations and to searches for weapons, this court is the only body which should make that determination.

By the same token, if Buie already stands at the outer limits of warrantless sweeps allowed by the Fourth Amendment, this court should make that clear.

This case sharply presents the interests at stake. On the one hand, police officers, acting for their own safety, conducted a protective sweep for weapons. A7. On the other hand, the home which was swept turned out to contain only innocent, sleeping family members. A8 n.2, A40-41.

These competing interests--officer safety versus the sanctity of the home--will continue to collide until the questions presented here are answered. They are ripe for resolution.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant his petition for a writ of certiorari to review the opinion and order of the Massachusetts Supreme Judicial Court affirming his convictions.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH vs. TAM S. BUI.

SJC-06069

SUPREME JUDICIAL COURT OF MASSACHUSETTS

419 Mass. 392; 645 N.E. 2d 689

November 7, 1994, Argued
February 1, 1995, Decided

PRIOR HISTORY: Middlesex. Indictments found and returned in the Superior Court Department on September 4, 1990. A pretrial motion to suppress evidence was heard by Peter M. Lauriat, J., and the case was tried before him.

DISPOSITION: Judgments affirmed.

COUNSEL: Wendy Sibbison for the defendant.

David R. Marks, Assistant District Attorney (David E. Meier, Assistant District Attorney, with him) for the Commonwealth.

JUDGES: Present: Liacos, C.J., Wilkins, Abrams, Nolan, Lynch, O'Connor, & Greaney, JJ.

OPINION: WILKINS, J.

On November 25, 1989, the bodies of Ngoc Le (older victim) and her fifteen-year old daughter Dixie Poulin (younger victim) were found in their basement apartment in Everett. There was evidence that each had been stabbed to death four days earlier and that the younger victim had received blunt force injuries. Jewelry and cash were missing from the apartment.

In the summer of 1990, the police received information that led to the arrest of the defendant and two other men.[1] After a long trial in April, 1992, slowed by the need in many

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[1]We are advised that, after the trial of this defendant, one of these men pleaded guilty to murder in the second degree of both victims and to armed robbery. The other man was apparently not charged with murder and was placed on pretrial probation. An unarmed robbery charge against him was dismissed.

instances for the use of interpreters of Vietnamese, the jury found the defendant guilty of murder in the first degree of both the older victim (based on deliberate premeditation and felony murder) and the younger victim (based on the same grounds and on extreme atrocity or cruelty). The jury also found the defendant guilty of armed robbery.

The defendant raises numerous issues in his appeal. (1) He challenges the denial of his pretrial motion to suppress a gun that had been seized in his parents' apartment. (2) He challenges the denial of his motion to suppress statements that he had made to the police that could have been viewed as evidence of consciousness of guilt. (3) He objects to the judge's limitation on the cross-examination of two important witnesses

who testified that the defendant had confessed to the murders and had made various admissions. The defendant argues that these two witnesses, Linh Nguyen and her husband (according to Vietnamese custom) Thinh Trinh, had a bias against him that, in violation of his constitutional rights, the judge prevented him from pursuing. (4) The defendant raises objections to the prosecutor's closing argument, to several trial rulings, and to the judge's charge on reasonable doubt.

We affirm the convictions and see no basis under G. L. c. 278, @ 33E (1992 ed.), for relief from the convictions of murder in the first degree.

1. Suppression of the gun. The judge did not err in denying the defendant's motion to suppress a handgun

found in a search of an apartment in the Dorchester section of Boston where the defendant's parents and other family members lived. The gun, introduced in evidence at trial, was important because it was identified as being similar to one that the defendant had had and as a gun that could have inflicted marks found on the skull of the younger victim.

The motion judge concluded that the defendant lacked standing because he had not proved, as was his burden (Commonwealth v. One 1985 Ford Thunderbird Auto., 416 Mass. 603, 608, 624 N.E.2d 547 [1993]), that he had an objectively reasonable expectancy of privacy in the place where the gun was found. The defendant made a limited showing of his involvement with his parents' apartment and may not now rely

on facts not presented to the judge as part of the proceedings on the motion to suppress the gun. We shall assume, without deciding, however, that the defendant had standing to challenge the seizure of the gun, and shall conclude that the police were entitled to seize it, based on the facts found by the judge.

Shortly after sunrise on August 18, 1990, the police entered the apartment pursuant to a "no-knock" warrant that authorized them to search the defendant and a warrant for the defendant's arrest. The police were seeking a gun believed to have been used in the course of the crimes. They recognized the possibility that other weapons might be found. When several police officers broke into the Dorchester apartment, the first officer

into the apartment entered the first room to the left of the front door, where there were three people, two women and a man. There were two mattresses on the floor. The first officer, accompanied by another officer, directed one of the women to get off one of the mattresses and then kicked it over, thereby uncovering the gun.

In such circumstances, involving the attempted execution of a warrant to arrest someone for committing two murders and involving a reasonable belief that weapons might be present on the premises, the police were entitled to act for their own safety. At the time the mattress was kicked over, the apartment had not been secured, and it was not known who was in it. It developed that the defendant was not present. He was arrested that morning

pursuant to the arrest warrant at another location. The police were entitled, however, to protect themselves from an apparent risk, and it does not matter that in retrospect that the peril was not as great as it had initially appeared.[2]

Our conclusion that the officer was entitled to protect himself and his associates from the threat of any readily accessible weapon, before the search of the premises for the defendant was completed and before the apartment's occupants were immobilized, is supported by the reasoning of Maryland v. Buie, 494

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[2]No doubt the police procedures were intimidating to the apartment's occupants, who all were innocent members of the defendant's family, but we do not regard the police conduct as so outrageous, as the defendant argues, as to require suppression of the gun. We, of course, express no view on the rights of the defendant's family members as a result of the police conduct and the force that the officers used.

U.S. 325 (1990). In the Buie case, the protective sweep was permissible, even though conducted after the person arrested pursuant to a warrant was in custody, if it was justified by articulable facts that "would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. at 334. In our case, the concern was weapons--not the possibility that the defendant or some confederate was under the mattress. The relevant safety concerns, however, are similar. In our case, the officer acted "to take reasonable steps to ensure their safety." Id. The search was limited in scope and occurred at a time when the suspicion of danger had not been dispelled. The officer could not have

known whether events in other parts of the apartment might distract him and his colleague, leaving the occupants of the room with access to any weapon under the mattress.

2. Suppression of statements. The defendant challenges the denial of his motion to suppress statements that he made to the police shortly after his arrest. He argues that his Miranda rights were violated. There was no error.

We summarize the judge's findings and rulings made after he heard the testimony of police officers, interpreters, and the defendant. After an interpreter in Vietnamese repeated Miranda warnings that a State trooper read in English, the defendant signed a card with Miranda warnings written in Vietnamese and said that he knew of his

rights.[3] The defendant had lived in this country and attended public schools since 1983. The judge concluded that the defendant had an adequate comprehension of English and that he had understood his rights when they were given to him both in English and in Vietnamese. The judge was warranted in finding that the defendant was sober, alert, and responsive during the police interview. The judge was not required to believe the defendant's testimony that he had requested an attorney after he had received Miranda warnings. The judge concluded that, beyond a reasonable doubt, the defendant was adequately advised of his Miranda rights, that he

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[3]When the defendant was arrested, he had also received Miranda warnings through an interpreter and had said that he understood his rights.

knowingly and voluntarily waived those rights, and that he voluntarily made statements after the waiver.

On appeal, the defendant argues that the Commonwealth's evidence was insufficient to prove that he waived his right to counsel and his right to remain silent. There was no evidence that, after giving Miranda rights, the police asked the defendant if he wanted a lawyer. The defendant understood that he was entitled to counsel, and the judge was warranted in finding that he did not ask for a lawyer. The law does not require that the police must go beyond the furnishing of Miranda rights and ask a person who understands his or her rights if he wants a lawyer. See Commonwealth v. Corriveau, 396 Mass. 319, 330, 486 N.E.2d 29 (1985).

The defendant exercised his right to remain silent as to certain questions asked of him, and the trial judge excluded those portions of the defendant's statements from the trial. On the other hand, the defendant volunteered answers to other questions. The defendant thus selectively declined to answer some questions and answered others. The evidence did not require the judge to find as a fact that the defendant was interrogated after he had asserted his right to remain silent. The judge did not err in ruling that the defendant's constitutional right to remain silent was not violated.[4]

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[4]The defendant for the first time on appeal complains specifically of the admission of his statement to the police that "I know my rights. My Constitution will protect me." We do not construe admission in evidence of that ambiguous

(continued...)

3. Motive to lie. The defendant sought to show, through cross-examination of Linh Nguyen and Thinh Trinh, that Linh Nguyen's father had gone to California in early 1990, when Linh Nguyen, Thinh Trinh, and the defendant were there; that while there, and in the presence of other individuals involved in the illegal distribution of drugs, her father had asked the defendant to carry drugs back to Boston; and that the defendant had refused. The defendant argued to the judge that he was entitled to inquire into this incident because it supported his argument that the testimony of Linh Nguyen and Thinh Trinh was given in

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[4](...continued)
statement as an improper reference to the defendant's assertion of a right to remain silent. Cf. Commonwealth v. Habarek, 402 Mass. 105, 110, 520 N.E.2d 1303 (1988).

retribution for the defendant's embarrassing refusal to cooperate. Defense counsel offered the evidence solely on the question of bias and motive to lie.

Linh Nguyen was an important witness for the prosecution because she testified that the defendant admitted to her that he and another man had killed the victims and that he had used a knife to kill people. She also testified that the defendant and the other man had given her jewelry which, the jury could have found, had been taken from the victims' apartment.

The defendant first raised the subject of the bias and motive to lie of the principal witnesses against him during his cross-examination of Linh Nguyen. The judge held a voir dire

hearing. Linh Nguyen said that she could not remember whether her father had been in California in early 1990 when she, Thinh Trinh, and the defendant were there. She had no memory of her father in California asking the defendant to bring narcotics back to Boston. Linh Nguyen's voir dire testimony provided no factual basis for the defendant's asserted grounds of her bias and motive to lie, and the judge was within his discretion in declining to admit her testimony about her failure of memory on the matters raised during her voir dire hearing. Defense counsel then asked Linh Nguyen before the jury whether she had asked the defendant to bring narcotics back for her father. The judge sustained an objection to that question, and the defendant does not specifically challenge this ruling on

appeal. Defense counsel established that Linh Nguyen returned from California by motor vehicle with Thinh Trinh, their young son, the defendant, and perhaps two others.

Thinh Trinh was also an important witness for the Commonwealth. He testified that, when the defendant saw Linh Nguyen's mother wearing a necklace taken in the robbery, the defendant told Thinh Trinh not to let her wear it "around here."[5] Thinh Trinh testified further that the defendant had told him that he had stabbed the older victim in the chest, had shown him a knife and said, "This is the knife that kill," and had shown him a gun similar to one in

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[5]Trinh Trinh testified that he then took the necklace from Linh Nguyen's mother and gave it to Linh Nguyen, and in the summer of 1990 took it from Linh Nguyen and gave it to a police officer.

evidence, as to which, as we have said, there was testimony connecting such a gun with impressions on the skull of the younger victim.

During the cross-examination of Thinh Trinh, defense counsel asked whether, before returning from California with the defendant, he had asked the defendant to bring narcotics back to Boston by airplane. The judge sustained an objection to the question, rejecting the defendant's argument that an affirmative answer would permit an argument that the witness was biased.

The judge also declined to allow a question as to whether Linh Nguyen's father had made a similar request and had been refused. The defendant then made an offer of proof, consistent with the circumstances considered during the

cross-examination of Linh Nguyen.[6] Unlike the situation during the cross-examination of Linh Nguyen, in which a voir dire hearing was held (which

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[6]Defense counsel: "The offer of proof would be that there's a good faith basis in any event, that this witness, testifying truthfully, would say that [Linh Nguyen's father] was there, Thinh Trinh was there, Linh Nguyen was there. [Her father] came out and asked my client to take back some narcotics. My client declined. They had made an investment in this kid; the kid declined to come through. They were angry. There were other parties who are players in Chinatown. The denied was in front of them. And when I say 'players,' I mean players in narcotics' trafficking."

The judge: "Beyond the names you've identified just now?"

Defense counsel: "That's correct, Your Honor."

The judge: "And what of it, I guess, is the question."

Defense counsel: "Again, Your Honor, the offer, the reason it's being offered, is to show that [the father] was turned down in front of other people, Thinh Trinh as well, and that this is, this whole thing is payback for that."

indicated that she had no testimony that would aid the defendant's bias argument), here no voir dire hearing was held or requested. We do not know whether Thinh Trinh would have supported any significant part of the defendant's theory of retribution, beyond his testimony that Linh Nguyen's father was present in California when he, Linh Nguyen, and the defendant were there.

In his appeal, the defendant argues that the judge erred in limiting his cross-examination of Linh Nguyen and Thinh Trinh, thereby violating his constitutional rights to due process of law and to confront witnesses under the United States and Massachusetts Constitutions. The argument is that he was entitled on cross-examination of these witnesses to pursue his theory that

their testimony was a "retribution-motivated fabrication" because they testified against the defendant on orders of Linh Nguyen's father in retaliation for the defendant's refusal to transport drugs.

The right of a criminal defendant to cross-examine a prosecution witness to show the witness's bias, and hence to challenge the witness's credibility, is well established in the common law, in the United States Constitution (Sixth Amendment), and in the Constitution of the Commonwealth (art. 12 of the Declaration of Rights). See Olden v. Kentucky, 488 U.S. 227, 231 (1988); Davis v. Alaska, 415 U.S. 308, 316-317 (1974); Commonwealth v. LaVelle, 414 Mass. 146, 153, 605 N.E.2d 852 (1993); Commonwealth v. Aguiar, 400 Mass. 508, 513, 510 N.E.2d

273 (1987); Commonwealth v. Joyce, 382 Mass. 222, 229, 415 N.E.2d 181 (1981). "A judge may not restrict cross-examination of a material witness by foreclosing inquiry into a subject that could show bias or prejudice on the part of the witness. . . . While a trial judge has discretion in this matter, he or she has no discretion to prohibit all inquiry into the subject." Commonwealth v. Aguiar, supra. If, on the facts, there is a possibility of bias, even a remote one, the judge has no discretion to bar all inquiry into the subject. Id. See Commonwealth v. Henson, 394 Mass. 584, 587, 476 N.E.2d 947 (1985). A judge does have discretion to limit cross-examination concerning possible bias when further questioning would be redundant. See Commonwealth v. LaVelle, supra at

154; Commonwealth v. Barnes, 399 Mass. 385, 393 (1987).

A defendant who seeks to pursue a subject in an attempt to demonstrate bias must make a plausible showing that the circumstances existed on which the alleged bias is based. See Commonwealth v. LaVelle, supra at 153; Commonwealth v. Quegan, 35 Mass. App. Ct. 129, 132-135, 617 N.E.2d 651 (1993) (no basis for finding relevance of excluded evidence "beyond tenuous, speculative assertion"). Cf. Commonwealth v. Fordham, 417 Mass. 10, 19-20, 627 N.E.2d 901 (1994) (defendant must show a reasonable likelihood that excluded evidence might have had more than minimal value to him).

The defendant's bias theory was too tenuous to be one that he was entitled to pursue on the record he presented. It

depended on a showing that Linh Nguyen's father, humiliated in front of others in the illicit drug trade and angered by the defendant's refusal to transport drugs, persuaded his daughter and Thinh Trinh, his son-in-law (by Vietnamese custom), to make false accusations against the defendant (and for some reason against two other persons who were not at all involved in the humiliation). This theory must account for the facts that (a) somehow Linh Nguyen and Thinh Trinh obtained the jewelry stolen from the victims' apartment and (b) they knew in some way of the victims' connection with the defendant and the two other men. It also requires acceptance of the idea, as to which no offer of proof was made, that the degree of humiliation and anger was so intense that Linh Nguyen's father

would put his own daughter and son-in-law, the parents of his grandson, in peril by directing them to testify falsely in a case involving murder in the first degree.

In any event, as the voir dire testimony of Linh Nguyen demonstrates, Linh Nguyen was not going to be a source of evidence in support of the defendant's bias theory. She said that she could not remember whether her father had been in California when she was there with Thinh Trinh and the defendant. The defendant did not ask for a voir dire of Thinh Trinh, which in these particular circumstances was a necessary part of the defendant's preservation of his rights on the bias issue. The bias theory was too

speculative to rest simply on counsel's offer of proof.[7]

4. Other issues. We now consider the defendant's other objections to conduct and rulings in the course of trial. (a) We discuss the denial of one discovery motion. On August 19, 1990, a Boston newspaper article concerning the crimes stated, according to sources, certain facts about the older victim.[8] The

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[7]The defendant challenges the judge's limitation on his right to cross-examine certain witnesses on various points. These matters related to collateral issues as to which the judge had discretion. Commonwealth v. Basch, 386 Mass. 620, 623, 437 N.E.2d 200 (1982). We see no prejudicial error or (alternatively, where the issue was not raised below) a substantial likelihood of a miscarriage of justice in any of the judge's rulings.

[8]"According to sources, investigators had been given information suggesting that Le--who reportedly often kept $ 2,000 to $ 3,000 in her pocketbook despite working at a low wage job at

(continued...)

defendant moved for disclosure of the sources in order to "establish the existence of other reasonable perpetrators of the offense as well as challenge the adequacy of the investigation." The motion was denied (and a subpoena to the reporter was quashed) before trial. The motion was again denied during trial. The denial of access to the reporter's confidential sources, based on a balancing of interests, was within the discretion of the two judges who considered the issue.[9] See Matter of a John Doe Grand

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[8](...continued)
Watson Mailing--was associated with criminals, possibly drug dealers. Her frequent visits to New York seemed suspicious, sources said."

"Poulin was said to be unhappy about the company her mother was keeping. . ."

[9]The reporter, by affidavit, stated that only one source provided information

(continued...)

Jury Investigation, 410 Mass. 596, 599-600, 574 N.E.2d 373 (1991).

(b) There was no likelihood of a miscarriage of justice in the admission through redirect examination of Thinh Trinh of testimony that he had given to the grand jury. Substantially all his testimony about what he had told the grand jury could have been admitted through direct testimony because it involved admissions that the defendant had made to him. This included the defendant's statement that one of his codefendants knew the older victim and knew of her jewelry and cash.

(c) The defendant objects to the judge's decision to permit an interpreter

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[9](...continued)
about the older victim's association with criminals or drug dealers and that the source was speculating.

to act as a substitute when the regular interpreter became ill. The defendant argues that the interpreter was biased against him. The interpreter had acted as an interpreter in the defendant's police interrogation and as a witness in the hearing on the defendant's motion to suppress his statements. The judge concluded that the interpreter was not biased. There is no claim that the interpreter was not qualified. The defendant had his own interpreter at counsel table and makes no claim that the interpreter approved by the judge translated incorrectly. There was no error.

(d) The defendant's objections to the prosecution's argument to the jury present neither prejudicial error, where there was objection, nor a substantial

likelihood of a miscarriage of justice, where there was no objection. This was a hard fought trial, but none of the objections to the prosecutor's argument requires a conclusion favorable to the defendant.

(e) The judge did not create a substantial likelihood of a miscarriage of justice in using the words "moral certainty" in the course of defining reasonable doubt for the jury. The charge adequately explained and limited the scope of those words. See Commonwealth v. Gagliardi, 418 Mass. 562, 571-572, 638 N.E.2d 20 (1994), cert. denied, 63 U.S.L.W. 3515 (Jan. 9, 1995).

5. Conclusion. The circumstances of this case do not warrant relief under G. L. c. 278, @ 33E. Judgments affirmed.

APPENDIX B

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse
Boston, Massachusetts 02108
(617) 557-1020

Wendy Sibbison, Esquire
26 Beech Street
Greenfield MA 01301

RE: No. SJC-06069

COMMONWEALTH
vs.
TAM S. BUI

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

Jean M. Kennett, Clerk

Dated: February 28, 1995

To: James W. Sahakian, A.D.A.
David R. Marks, A.D.A.
Wendy Sibbison, Esquire

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
CRIMINAL ACTION
NO. 90-2753-56

COMMONWEALTH

vs.

TAM SICH BUI

FINDINGS OF FACT, RULINGS OF LAW AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Tam Sich Bui ("Bui") and two other individuals[1] have been indicted for murder and armed robbery arising from an alleged home invasion in Everett in November, 1989. Bui has moved to suppress from evidence at trial a .38

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[1] Long Phan and Hung Truong.

caliber handgun and two sets of handcuffs seized in a bedroom of a third floor apartment at 110 Saxon St. in Dorchester, Massachusetts ("the apartment") during the execution of search and arrest warrants for Bui early in the morning of August 18, 1990. Bui asserts that the seizure of these items violated his rights under the Fourth and Fourteenth Amendments to the U.S. Constitution, Article XIV of the Massachusetts Declaration of Rights and G.L. c. 276, §1.

The court conducted an evidentiary hearing on Bui's motion to suppress evidence on December 17, and 19, 1991. It heard testimony from State Trooper William Christiansen, Lt. Michael Broderick and Sgt. Harold Cataldo of the Boston Police Department, and Than Bui,

Nguyen Sich, Thui Bui and Tri Bui, who occupied the apartment at 110 Saxon Street at the time of the search and seizure. It also received into evidence several exhibits, including the handgun, the two sets of handcuffs and photographs of the apartment.

Upon consideration of the testimony of the witnesses and the exhibits presented at the hearing, and the memoranda and arguments of counsel for the defendant and the Commonwealth, the court makes the following findings of fact, rulings of law and order with respect to the defendant's motion to suppress evidence in this case.

FINDINGS OF FACT

1. On November 25, 1989, State Trooper William Christiansen ("Christiansen") of the Middlesex County

District Attorney's office, was assigned to investigate the alleged murders of Ngoc Le and her daughter, Dixie Poulin in their basement apartment at 4 Avon Street in Everett, Massachusetts. The victims, who were bound and gagged with duct tape, died of multiple stab wounds. Poulin also received multiple blunt trauma to the head, allegedly caused by a gun. There was evidence that they had been robbed.

2. On July 3, 1990, Christiansen spoke with Trinh Trinh as part of his investigation. Trinh advised Christiansen that Bui told Trinh that he had used a gun at Ngoc Le's apartment in November 1989.

3. Christiansen also spoke with Lunh Nguyen in July of 1990. Nguyen told him that Bui had told her that he had

participated in the robbery and murders in Everett in November of 1989. On August 16 or 17, 1990, Nguyen informed Christiansen that Bui had just returned to Boston from a trip to Texas and that he would be at the third floor apartment on 110 Saxon Street on August 18, 1990 for the wedding of his sister.

4. On August 17, 1990, Christiansen obtained arrest warrants for Bui, Long Phan and Hung Truong from the Malden District Court for the murders of Ngoc Le and Dixie Poulin on or about November 25, 1989. He then submitted an affidavit to the Malden District Court in support of search warrants for those three individuals at three locations: Bui at 110 Saxon Street in Dorchester; Truong at 10 Lincoln Street in Dorchester; and Phan at 61 Richfield

Street in Dorchester (Exhibit 1). A search warrant was issued which authorized a nighttime "no-knock" search for Bui at 100 Saxon Street in Dorchester.

5. After the arrest and search warrants were issued on August 17, 1990, Christiansen met with Lt. Michael P. Broderick and Deputy Superintendent Eager of the Boston Police Department and discussed the proposed execution of the arrest and search warrants for the three males, the gun allegedly used in the murders and robbery and the possibility that other guns might be found.

6. A Boston Police Assault and Apprehension Team, ("the entry team") was assigned to execute each of the search warrants on August 18, 1990. In the early hours of that morning, the members

of the teams and several state troopers, including Christiansen and Trooper Connolly, met at a Boston police station for a final briefing. They departed from the police station at 6:00 a.m. and arrived at the three locations a few minutes later. Christiansen accompanied the team assigned to the 100 Saxon Street location.

7. The 100 Saxon Street entry team was comprised of 6 Boston Police officers, two of whom carried sledgehammers to break down the main door to the building and the front and back doors to the third floor apartment, two of whom carried bullet-resistant shields, and all of whom had their weapons drawn.

8. Sargent Harold Cataldo of the Boston Police was the first officer to enter the third floor apartment at 110

Saxon Street. He immediately yelled, "Police," and then, followed closely by his partner, he entered the first room to the left of the front door. Cataldo observed two females and a male in the room. One of the two females was reclining on a bed and the other was in the process of alighting from another bed. The male was standing by the window.

9. Cataldo focused on one of the females and his partner focused on the male and the second female. After entering the room, Cataldo and the other officer ordered the occupants to lie on the floor in the center of the room. As the occupants complied, the officers kicked over the two mattresses. Underneath the mattress that Cataldo kicked over were a .38 caliber handgun

and two sets of silver handcuffs (Exhibits 6, 7). The occupants of the room were later identified as Tam Van Bui, the defendant's father and Than Bui and Thao Bui, the defendant's sisters.

10. After the entry team had secured the other rooms in the apartment, they bound the hands of the occupants behind their backs with "plexi cuffs" and moved them to the floor of the living room.

11. The entry team's initial sweep of the apartment took less than two minutes. The State Troopers entered the apartment after the entry team's initial sweep. Police officers remained in the apartment for approximately an hour.

12. At the time of the police entry into the third floor apartment at 110 Saxon Street on August 18, 1990, Thanh

Bui and Thao Bui, who were Bui's sisters, occupied the first room to the left of the front door to the apartment. Tam Van Bui and Nguyen Sich, who were Bui's parents, occupied the first bedroom to the right of the front door to the apartment. Thui Bui, who was Bui's sister, and her husband Luc Truc, occupied a third bedroom and Tri and Tien Bui, who were Bui's younger brothers, occupied the living room.

13. Bui returned to Boston from a trip to Texas on August 15, 1990. He slept in the living room of the third floor apartment at 110 Saxon Street that evening. Bui was not living or staying at 110 Saxon Street at the time of the police search on August 18, 1990. He was found and arrested later that morning by members of the Boston Police entry team

that were assigned to execute the arrest and search warrants at 10 Lincoln Street in Dorchester.

14. Tam Van Bui, the defendant's father, identified the gun found by the police at 110 Saxon Street as one that belonged to Bui.

RULINGS OF LAW

In the present case, the police made an unannounced entry into the third floor apartment at 110 Saxon Street at approximately 6:00 a.m. on August 18, 1990 pursuant to arrest and search warrant that had been issued for the defendant Bui. The search warrant approved and issued by the Magistrate on August 17, 1990 authorized a nighttime, no-knock entry into the apartment to search for Bui. As such, the search was within the scope of the warrant. See

Commonwealth v. Cundriff, 382 Mass. 137 (1980). Although the search did not result in Bui's apprehension, a handgun and two sets of handcuffs were found and seized during the course of the search. Bui contends that the seizure of those items was unlawful and that they must therefore be suppressed.

I.

In order to have standing to contest the validity of a search and seizure, the defendant must first show that his constitutional rights, and not those of another, were violated. Commonwealth v. King, 389 Mass. 233, 240 (1983). The defendant has the burden of establishing that he had a reasonable expectation of privacy in the place that was searched or the item seized before being able to assert that the search was illegal and

that the evidence should be suppressed. See Commonwealth v. Glowachi, 398 Mass. 507, 512 (1986); Commonwealth v. Santoro, 406 Mass. 421, 422 (1990).

The "automatic standing" rule, adopted by the Supreme Judicial Court in Commonwealth v. Amendola, 406 Mass. 592 (1990), has obviated the requirement of applying an "expectation of privacy" analysis in certain cases. As a matter of state Constitutional law, "[w]hen a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of that evidence." Commonwealth v. Frazier, 410 Mass. 235,

242-243 (1991), quoting Commonwealth v. Amendola, 406 Mass. 592, 601 (1990).

The dispositive issue in determining whether a defendant has automatic standing to contest the legality of the search and seizure of the evidence is whether "possession of the seized evidence at the time of the contested search is an essential element of guilt." Commonwealth v. Amendola, 406 Mass. at 601. "Possession implies 'control and power', . . . exclusive or joint . . . or, in the case of constructive possession, knowledge coupled with the ability and intention to exercise dominion and control." Commonwealth v. Pratt, 407 Mass. 647, 651 (1990), quoting Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989).

The defendant Bui has been indicted for murder, robbery while armed with a knife, and robbery while armed with a handgun.[2] "The essence of robbery is the exertion of force, actual or constructive against another in order to take personal property . . . with the intention of stealing it, from the protection which the person of that other affords . . ." Commonwealth v. Novicki, 324 Mass. 461, 464 (1949). Armed robbery is merely an aggravated form of common law robbery made punishable by statute. Commonwealth v. Nickologines, 322 Mass. 274, 277 (1948). Use of a dangerous weapon is not necessary to prove the

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[2] G.L. c. 265, §17 provides, in relevant part, "whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment . . ."

offense of armed robbery. "The gist of the offense is being armed [at the time of the offense], not the use of the weapon." Id. at 277.

Bui was not in possession of the handgun or handcuffs at the time the third floor apartment was searched on August 18, 1990. Nor was he in possession of or an occupant of those premises at the time of the search. Proof of Bui's possession of the handgun and handcuffs seized from the apartment at 110 Saxon Street is not an essential element of the crime of armed robbery. Compare Commonwealth v. Frazier, 410 Mass. at 244-245. Therefore, the defendant has no "automatic standing" to contest the seizure of the handgun and handcuffs in this case. Commonwealth v. Mora, 402 Mass. 262 (1988).

II.

Absent a determination of automatic standing, "whether the government's activity amounted to a search depends on whether the activity intruded on the defendant's reasonable expectation of privacy." Commonwealth v. Pina, 406 Mass. 540, 544 (1990), citing Rawlings v. Kentucky, 448 U.S. 98, 104-106 (1980). "For a search to have taken place, the defendant must have had a subjective expectation of privacy, and that expectation must have been one that society recognizes as objectively reasonable." Commonwealth v. Pina, 406 Mass. at 544, citing Commonwealth v. Panetti, 230 Mass. 231-232 (1989). "In connection with a suppression motion, a defendant has the burden of establishing that the government has intruded on his

or her reasonable expectation of privacy, thus establishing that a search has taken place." Commonwealth v. Pina, 406 Mass. at 544, citing Commonwealth v. D'Onofrio, 396 Mass. 711, 714 (1986). Once the defendant meets his burden, the government must show that the search was reasonable and therefore lawful. Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974).

Several factors may be considered to determine the reasonableness of the defendant's expectation of privacy, including the nature of the place involved, whether the defendant owned the premises or controlled access to them, whether the defendant has a possessory or ownership interest in the item seized, and whether the defendant had taken normal precautions to protect his

privacy. Commonwealth v. Pina, 406 Mass. 540, 545 (1990).

In the present case, there is nothing in the record to show the defendant owned or controlled access to the third floor apartment at 110 Saxon Street. There is no evidence that the defendant has asserted a possessory or ownership interest in the apartment or in the items that were seized from the apartment. The evidence does not establish that Bui was an occupant of the apartment at the time of the search and seizure. When Bui was last at the apartment, two days prior to the search, he slept on the couch in the living room. The handgun and handcuffs were found under a mattress in the front bedroom occupied by Bui's two sisters. The defendant has therefore failed to meet

his burden of establishing that he had a reasonable expectation of privacy in the place from which the handgun and handcuffs were seized.

Having failed to prove that he had a reasonable expectation of privacy, no search implicating the Fourth Amendment to the United States Constitution or the Massachusetts Constitution or G.L.c. 276, §1 has occurred with respect to the defendant Bui.

ORDER

For the foregoing reasons, the defendant Tam Sich Bui's motion to suppress evidence is hereby **DENIED**.

Peter M. Lauriat
Justice of the Superior Court

Dated: March 24, 1992

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
NOS. 90-2753-56

COMMONWEALTH

v.

TAM S. BUI

AFFIDAVIT OF TAM S. BUI

I, Tam S. Bui, do on personal knowledge state as follows:

1. My family resided at 110 Saxton St., Dorchester, Massachusetts on August 18, 1990.

2. They had been living there just a few months on the third floor.

3. 110 Saxton Street, third floor, Dorchester, was my living address and permanent address as well.

4. I had lived there with my family also during those few months.

5. Occasionally, I stayed at 10 Lincoln Street, Dorchester, on weekends.

6. At the 110 Saxton Street apartment on the third floor I usually slept in the living room. Occasionally, I slept in the front bedroom where the gun was seized.

7. I had stayed at least one night at 110 Saxton Street the week prior to the seizing of the gun on August 18, 1990. I only stayed the night at 10 Lincoln Street because I was drinking.

8. This affidavit was translated for me.

Signed under the penalties of perjury this 16th day of December, 1991.

Tam S. Bui